January 26th Field

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 404.

WARREN MITCHELL, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED APRIL 14, 1874.

Oct. D. 1874

SUPREME COURT OF THE UNITED STATES.

No. 404.

WARREN MITCHELL, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 *Petition.*

U. S. Court of Claims. December term, 1867.

WARREN MITCHELL
vs.
THE UNITED STATES. } 3342. Filed July 29, 1868.

To the honorable Court of Claims:

The petition of Warren Mitchell, a loyal citizen of the United States, showeth:

That, in the month of December, A. D. 1864, your petitioner was the owner and in possession of seven hundred and thirty-eight (738) bales of cotton, of the aggregate weight of three hundred and forty-nine thousand seven hundred and eighty-seven (349,787) pounds, then stored in the city of Savannah, in the State of Georgia; that, about three weeks after the occupation of said city of Savannah by the United States forces, to wit, on the 18th day of January, A. D. 1865, all of the said cotton was seized and taken possession of by the military forces of the United States, acting, as your petitioner is informed and believes, under the orders of Major Gen. William T. Sherman, but without the consent of your petitioner and against his will; that no part of the said cotton or its proceeds was appropriated in any way to the use of the Army or Navy of the United States, but the said cotton was turned over by the officers seizing it to an agent of the Treasury Department, by whom it was sold, and the net proceeds thereof have been paid into the Treasury of the United States.

2 Your petitioner avers that he is unable to state the precise sum for which said cotton was sold, or the expenses attending its seizure, shipment, transportation, and sale; but he states, on information and belief, that the net proceeds thereof which have been paid into the Treasury amount to fifty cents per pound, or the aggregate sum of one hundred and seventy-four thousand eight hundred and ninety three ($174,893) dollars.

Your petitioner further shows that his said cotton has never been abandoned or forfeited, or become liable to confiscation under any of the acts of Congress in that behalf made and provided; and that it was not liable to seizure or capture under the laws of nations or the rules and usages of war; that no proceedings for the purpose of condemning said cotton have ever been instituted in any court or before any tribunal.

Your petitioner avers that his property, having been taken possession of by the United States Government, and appropriated by it, an implied contract has arisen to make your petitioner just compensation therefor by paying him all that said cotton was reasonably worth at the time and place it was so taken from him as aforesaid.

And your petitioner shows that said cotton, at the time and place of its seizure, was worth one dollar per pound, or the aggregate sum of three hundred and forty-nine thousand seven hundred and eighty-seven ($349,787) dollars, which amount he is entitled to receive from the United States, under the implied contract, as above stated.

Your petitioner further shows that if there has been a valid and lawful capture of said cotton, which he understands is asserted by the United States, he is nevertheless entitled to receive the net proceeds of it, amounting to the said sum of one hundred and seventy-four thousand eight hundred and ninety-three ($174,893) dollars, under the provisions of the third section of the act of Congress, approved

March 12, 1863, entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States."

Your petitioner further shows that he has at all times borne true allegiance to the Government of the United States, and that he has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; and he prays the
3 judgment of this honorable court for the said sum of one hundred and seventy-four thousand eight hundred and ninety-three dollars, ($174,893.)

HUGHES, DENVER & PECK,
Solicitors for Claimant.

STATE OF KENTUCKY,
County of Jefferson, ss:

Warren Mitchell, being duly sworn, deposeth that he is the claimant in the foregoing petition; that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made, except as in said petition is stated; that claimant is justly entitled to the amount therein claimed from the United States after allowing all just credits and offsets, and that he believes the facts as stated in said petition are true.

WARREN MITCHELL.

Sworn and subscribed to before me, a notary public in and for said county and State, by Warren Mitchell, personally known to me.

Witness my hand and official seal this twenty-second day of July, A. D. 1868.

[SEAL.]

W. R. THOMPSON,
Notary Public, Jefferson County.

Claimant's address is Louisville, Kentucky.

Claimant's solicitors, HUGHES, DENVER & PECK,
258 *G Street, Washington, D. C.*

4 In the United States Court of Claims. December term, A. D. 1868.

WARREN MITCHELL
vs.
THE UNITED STATES. } No. 3342.

And the said defendants, by their Attorney-General, come and make answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of $174,893, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

T. LYLE DICKEY,
Assistant Attorney-General.

And for a further plea to the said petition, the said defendants say that the said claimant ought not to have or maintain his aforesaid action

against the said defendants, because they say that the said claimant did not, "within two years after the suppression of the late rebellion, prefer his claim to the proceeds" of the property mentioned and described, in the Court of Claims, as provided by the 3d section of the act of Congress approved March 12, 1863, and entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States."

T. LYLE DICKEY,
Assistant Attorney-General.

And for a further plea to the said petition, the said defendants say that the said claimant ought not to have or maintain his aforesaid action against the said defendants, because they say that the said claimant, at the time of the filing of his said petition, was an alien, and that the said seizure and taking possession of the said property named in the said petition, and the said several acts and doings of the defendants, their officers, servants, and agents therein set forth were made and done in the administration of, and in virtue and under color of, the act of Congress entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States."

Whereby and by virtue of the provisions of the act of Congress entitled "An act regulating judicial proceedings in certain cases, for the protection of officers and agents of the Government, and for the better defense of the Treasury against unlawful claims," approved July 27, 1868, the claimant is barred of his said action against the defendants.

T. LYLE DICKEY,
Assistant Attorney-General.

Filed July 19, 1869.

5 In the Court of Claims.

WARREN MITCHELL *vs.* THE UNITED STATES. } 3342.

At a Court of Claims held at the Capitol, in the city of Washington, the 9th day of March, A. D. 1874, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said claimant's petition be dismissed.

By the court.

A true copy of record.

6 United States Court of Claims.

WARREN MITCHELL *vs.* THE UNITED STATES. } 3342.

Now comes the claimant, by his attorney and solicitor, John M. Harlan, and asks for an appeal from the decision and judgment of this court rendered herein on the ninth day of March, 1874, to the Supreme Court of the United States.

JOHN M. HARLAN,
Attorney & Solicitor for Warren Mitchell, Claimant.

Filed March 30, 1874.

Ordered that the appeal be allowed as prayed for.

Byt he court.

7 United States Court of Claims.

WARREN MITCHELL
vs.
THE UNITED STATES. } No. 3342.

Findings of fact and conclusions of law.

This case having been heard before the chief-justice and judges of the Court of Claims, at the city of Washington, on the 20th day of January, 1874, the court, after due deliberation upon the proofs and evidence given at the trial, does hereby, at the time of rendering judgment, find the following facts:

First. At the breaking out of the rebellion, the claimant, a citizen of the United States, resided at Louisville, in the State of Kentucky, where he was engaged in business. During the month of July, 1861, and subsequent to the 17th of the month, he procured from the commanding general in Kentucky a military pass permitting him to go through
8 the military lines into the insurrectionary district. Under this pass he went into the territory of the Confederate States, and remained there until the latter part of the year 1864, when he returned to Louisville. While within the insurrectionary district he transacted business, collected debts, and purchased from various parties seven hundred and thirty-four bales of cotton. Of this cotton he acquired possession and stored it in the city of Savannah.

Second. On the capture of Savannah, the cotton before described was seized by the military authorities, and subsequently sold by the agents of the Government. The proceeds thereof are in the Treasury, amounting in the aggregate to the sum of one hundred and twenty-eight thousand six hundred and ninety-two dollars and twenty-two cents, ($128,692.22.)

And the Court of Claims, being equally divided upon the ques-
8½ tion whether the claimant acquired a valid title to the cotton so purchased, does, for the purposes of an appeal, decide that the petition should be dismissed.

By the court.

Filed January 24, 1874.

9 United States Court of Claims.

WARREN MITCHELL
vs.
THE UNITED STATES. } 3342. Filed Jan'y 20, 1874.

In this case the claimant, by his attorney, desires the court to find whether at the time of making the order herein of January 19th, 1874, substituting John M. Harlan as attorney of record, he, said claimant, by his said attorney, did or not except to and protest against so much of said order as gave a lien to Denver and Peck, surviving partners of Hughes, Denver and Peck, upon the cause of action and any judgment herein to secure such contingent fee and costs as had been agreed by said claimant to be paid to said firm of Hughes, Denver and Peck; and whether said claimant did or not ask said exception and protest to be en-
10 tered of record; also whether the court did or not refuse to enter such exception and protest of record. The facts thus asked to be found are deemed by claimant material to any judgment in this case.

WARREN MITCHELL,
By JOHN M. HARLAN,
His Attorney of Record.

On the foregoing proposed findings by the claimant, the court made the following order, to wit:

Refused, as not being the subject of an appeal.

By the court.

11 United States Court of Claims.

WARREN MITCHELL
vs.
THE UNITED STATES. } No. 3342. Filed January 28, 1874.

And now comes the claimant, by his attorney, and makes this his request for additional finding of facts, as follows:

First. That the claimant purchased the seven hundred and thirty-four bales of cotton named in the original finding herein, in the latter part of the year 1864, to wit, in the months of November and December of that year.

Second. That the said claimant remained within the insurrectionary lines from July, 1861, until after the capture of the city of Savannah by the United States military forces under General Sherman.

JOHN M. HARLAN,
Attorney for Claimant.

12 On the foregoing proposed findings by the claimant, the court made the following order, to wit:

Allowed.

By the court.

The court did not deliver an opinion in this case.

JNO. RANDOLPH,
Ass't Clk C't of Claims.

13 In the Court of Claims.

WARREN MITCHELL
vs.
THE UNITED STATES. } No. 3342.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the attorney for the claimant for the allowance of an appeal, as filed in the clerk's office March 30, A. D. 1874, and of the order of the court, March 30, 1874, allowing the same; of the findings of fact and conclusion of law thereon by the court; of the proposed additional findings of fact filed by the counsel for claimant, and of the orders of the court thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this fourteenth day of April, A. D. 1874.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 404. Warren Mitchell, appellant, vs. The United States. Court of Claims. Filed 14th April, 1874.

REC. 404—2

C

Supreme Court of the United States.

DECEMBER TERM, 1874.

WARREN MITCHELL, Appellant,

VERSUS

The UNITED STATES, Appellee.

No. 404.

Appeal from the Court of Claims.

JOHN M. HARLAN, Attorney for Appellant.

JOHN P. MORTON & CO., PRINTERS, LOUISVILLE.

Supreme Court of the United States.

DECEMBER TERM, 1874.

WARREN MITCHELL, Appellant,

VERSUS

The UNITED STATES, Appellee.

No. 404.

Appeal from the Court of Claims.

JOHN M. HARLAN, Attorney for Appellant.

JOHN P. MORTON & CO., PRINTERS, LOUISVILLE.

Supreme Court of the United States

DECEMBER TERM, 1874.

WARREN MITCHELL, APPELLANT,
VERSUS
THE UNITED STATES, APPELLEE.

No. 404.
Brief for Appellant.

APPEAL FROM THE COURT OF CLAIMS.

This suit was instituted on the 29th of July, 1868, to recover the proceeds of seven hundred and thirty-four bales of cotton purchased by Mitchell, in the state of Georgia, in the months of November and December, 1864, and which were seized by the authorities of the United States, at Savannah, Ga., in the early part of the year 1865, after the occupation of that city by the military forces under General Sherman.

The Court of Claims was equally divided upon the question whether the appellant acquired a valid title to the cotton in controversy, and for the purposes of appeal decided that the petition should be dismissed.

At the time of rendering judgment the Court of Claims, in pursuance of the rules prescribed by this court, returned the following finding of facts, and rendered the following judgment:

"*First*—At the breaking out of the rebellion the claimant, a citizen of the United States, resided at Louisville, in the state of Kentucky,

where he was engaged in business. During the month of July, 1861, and subsequent to the 17th of the month, he procured from the commanding general in Kentucky a military pass permitting him to go through the military lines into the insurrectionary district. Under this pass he went into the territory of the Confederate States, and remained there until the latter part of the year 1864, when he returned to Louisville. While within the insurrectionary district he transacted business, collected debts, and purchased from various parties seven hundred and thirty-four bales of cotton. Of this cotton he acquired possession, and stored it in the city of Savannah.

"*Second*—On the capture of Savannah the cotton before described was seized by the military authorities, and subsequently sold by the agents of the Government. The proceeds thereof are in the treasury, amounting in the aggregate to the sum of one hundred and twenty-eight thousand six hundred and ninety-two dollars and twenty-two cents ($128,692.22).

"And the Court of Claims, being equally divided upon the question whether the claimant acquired a valid title to the cotton so purchased, does, for the purposes of an appeal, decide that the petition should be dismissed." (Pr. Rec. 4.)

On a subsequent day the claimant made a request, in writing, to the court to find the following facts:

"*First*—That the claimant purchased the seven hundred and thirty-four bales of cotton named in the original finding herein in the latter part of the year 1864, to wit, in the months of November and December of that year.

"*Second*—That said claimant remained within the insurrectionary lines from July, 1861, until after the capture of the city of Savannah by the United States military forces under General Sherman." (Pr. Rec. 4.)

The court so found. (Pr. Rec. 4–5.)

The object of Mitchell in procuring a "military pass, permitting him to go through the military lines into the insurrectionary district," does not appear from the findings of fact. There was certainly no purpose on the part of either Mitchell or the department commander

STATEMENT OF ERRORS.

The Court of Claims erred:

1. In not deciding upon the facts found, that appellant acquired a valid title to the cotton purchased by him in November and December, 1864, and referred to in the finding of facts.

2. In not rendering judgment, upon the facts found, in favor of Mitchell, for the sum of $128,692 22.

3. In dismissing Mitchell's petition.

to violate any statute of the United States, for the President had not, at the time the pass was given, published his proclamation in pursuance of the statute of July 13, 1861, which statute, by its terms, became effective only upon the making of such proclamation.

It is not stated that Mitchell procured the military pass for the purpose of bringing money or property *from* the enemy's territory in violation of the laws of war or any statute of the United States. Nor is there any thing in the finding of facts which indicates that the commanding general in Kentucky intended his military pass as a license to trade with the enemy *across* the lines of military occupation.

It is stated that "while within the insurrectionary district he transacted business, collected debts, and purchased from various parties seven hundred and thirty-four bales of cotton;" but it is not found by the court below that the military pass was granted him for the purpose of enabling him to transact any particular business in the South, or to collect debts there, or to purchase the cotton referred to in the findings. Nor is it found that he took any money with him across the lines in July, 1861, or that the cotton which he had stored in Savannah was purchased with any money he took from Kentucky into the insurrectionary district, or that he had any purpose to bring it across the lines or send it out of the insurrectionary district. So far then as this cotton is concerned, the Court of Claims finds only that it was purchased by Mitchell in November and December, 1864, nearly *three years and a half after* he "went into the territory of the Confederate States"

with the permission of the military authorities. There is therefore no necessary or direct connection between the fact of his going into the Confederate lines in July, 1861, whether lawfully or wrongfully, and the fact of his purchasing seven hundred and thirty-four bales of cotton in Georgia in November and December, 1864.

Had Mitchell upon his entering the Confederate lines in July, 1861, joined the rebel army and become the owner of this identical cotton, while he was endeavoring to overturn the Government of the Union, it could scarcely be doubted that, under the present course of decisions, his right to recover the proceeds of the cotton could not be questioned. Since the decisions in *Armstrong* v. *United States* (13 Wallace, 154), *Pargood* v. *United States* (13 Wallace, 156), and *United States* v. *Klein* (13 Wallace, 128), neither proof of loyalty or of special executive pardon is necessary on behalf of claimants of the proceeds of captured and abandoned property. The amnesty proclamation of December 25, 1868, has wholly removed the obstacle of disloyalty placed in the way of claimants of captured and abandoned property by the act of March 12, 1863. (12 Stat. 820.)

Suppose, however, that Mitchell went into the territory of the rebellion, voluntarily submitting to its authorities and acquiring a residence there, yet with no intention to raise his hands against the Government of the Union, but for the purpose only of guarding and protecting the property which he owned in that section; and suppose further, that during the whole time he was within the Confederate lines he neither traded across the lines nor

gave any aid or comfort to the Confederate army, beyond the mere fact that he voluntarily acquired and maintained a domicile within its lines—and those suppositions are not inconsistent with the findings of fact by the Court of Claims—can it be possible that he will occupy in the courts of the United States a less favorable attitude than he would have done had he actually taken up arms and made war upon the Government of the Union?

And yet that precise result must be reached in this case if Mitchell is denied the right to the proceeds of the cotton in question.

Was there any thing in the conduct of Mitchell as described in the findings of the facts, or is there any principle announced in former decisions, which will preclude this court from granting to Mitchell what they would be constrained under its former decisions to grant him had he joined the Confederate army and become the owner of the cotton while he was seeking the destruction of the Union?

We confidently submit that a judgment can be awarded Mitchell without violating any rule of international law or departing from any decision heretofore rendered in this court.

On behalf of the United States, it was contended in the court below that Mitchell disregarded his obligations of allegiance to the United States, and violated both the laws of war and the statutes of Congress by going into the insurrectionary district.

We grant that Mitchell, by voluntarily entering the Confederate lines and taking up his residence there, was untrue to the obligations of duty which every citizen of

the United States owes to his country when assailed by armed rebellion. But that offense, in the eye of the law or in the forum of conscience, was no greater than that committed by every loyal citizen of the South who, having an opportunity to leave the territory of the rebellion and come within the Federal lines, yet voluntarily remained with their families and their property in the insurrectionary districts, submitting to the authority of the Confederate Government. For that class of people in the South and their unfortunate condition this court, speaking through Mr. Justice Davis in the case of *United States* v. *Anderson* (9 Wall. 65), expressed the warmest sympathy. In that case this court held that the provisions of the captured-and-abandoned-property act afforded abundant evidence that the Congress of the United States also felt a sympathy with the Union men of the South; and yet, in strict law, they occupied no better condition than the citizen of a border state who went South for the purpose of saving his property. The southern loyalist who voluntarily remained within the lines of the rebellion for the purpose of saving his property can occupy no more favorable attitude in the courts than the citizen of Kentucky who at the commencement of the war went into the insurrectionary district to save his estate, and not to fight his country. Each, in strict law, disregarded his obligations of allegiance and duty.

In Mitchell's case there is one fact in connection with his going South which should not be forgotten. He went into the Confederate lines by the permission of the general commanding the Department of Ken-

tucky, and not in violation of any military orders which had then been issued. His military pass could not protect him in unlawful trading between the belligerent sections, but it did "protect him in going into the lines of the enemy." (*McKee* v. *United States*, 8 Wall. 166.) It is true that he left Kentucky after the non-intercourse act of July 13, 1861, was passed; but, as already stated, his departure was prior to the proclamation of August 16, 1861, issued in pursuance of that act. By the terms of the act of July 13, 1861, commercial intercourse between the belligerent sections became unlawful *when* the President issued a proclamation defining the bounds of the insurrection. As Mitchell left Kentucky before that proclamation was issued, his going South was not therefore a violation of the non-intercourse act of July 13, 1861, even if it be conceded that the mere act of going South was itself commercial intercourse.

But it may be said that a state of war existed prior to July 13, 1861, so far as to make it unlawful for Mitchell to pass into the Confederate lines for any purpose whatever. We do not admit that the department commander in Kentucky—for the time being representing in that locality all the military power which an officer could possess—was without authority to pass Mitchell across the lines into the insurrectionary district in advance of the President's proclamation of August 16, 1861. It seems to me difficult to establish the absence of such authority in General Anderson as the commander of a department. But whether he had or not such authority is, we think, wholly immaterial in this case. If he transcended his authority as department commander, that

would only prove that Mitchell violated his duty in accepting the military pass and going into the Confederate lines. For that violation of duty he may have been punished, if any punishment had been prescribed by law for such an offense. Clearly, however, that violation of duty did not in its consequences extend to and vitiate the various business transactions which he may have had, or the various purchases of property which he may have made, within the Confederate lines after taking up his residence there; transactions wholly within enemy's territory, and exclusively with residents of that territory, involving in no way commercial intercourse or communication, by letter or otherwise, *with the territory* occupied by the Federal forces; and purchases so remote in time from the date of his entrance into Confederate territory that it is impossible to establish any necessary or direct connection between those purchases and the alleged violation of duty in going into the insurrectionary district as far back as July, 1861.

When Mitchell left Kentucky and went into the Confederate lines, taking up his residence there, transacting business, collecting debts, and making purchases during a period of more than three years, he took the chances of war from that side. He became liable, by such voluntary and long-continued residence, to be treated as an "enemy," at least as to all matters of commercial or other intercourse. He thus became subject to all the disabilities and penalties of other persons voluntarily remaining within the Confederate lines, and this too without reference to his individual disposition toward the Government of the United States. He had

been domiciled in enemy's territory for more than three years when he purchased this cotton.

In discussing the question of domicile as affecting the rights of persons during a state of war, Sir W. Scott has said:

"Time is the grand ingredient in constituting domicile. In most cases it is unavoidably conclusive. It is not unfrequently that if a person comes only for a special purpose, *that* shall not fix a domicile. This is not to be taken in an unqualified latitude, and without some respect to the time which such a purpose may or shall occupy; for if the purpose is of such a nature as *may probably*, or *does actually*, detain the person for a great length of time, a general residence might grow upon the special purpose. A special purpose may lead a man to a country where it shall detain him the whole of his life. Against such a long residence the plea of an original special purpose could not be averred; it must be averred in such a case that other purposes forced themselves upon him, and mixed themselves with the original design, and impressed upon him the character of the country where he resided. Supposing a man comes into a belligerent country at or before the beginning of the war, it is certainly reasonable not to bind him too soon to an acquired character, and to allow him a fair time to disentangle himself; but if he continues to reside during a good part of the war, contributing by the payment of taxes and other means to the strength of the country, he could not plead his special purpose with any effect against the rights of hostility. If he could, there would be no sufficient guard against the frauds and abuses of masked, pretended, original, and sole purposes of a long-continued residence. There is a time which will estop such a plea; no rule can fix the time *a priori;* but such a rule there must be. In proof of the efficacy of mere time, it is not impertinent to remark that the same quantity of business which would not fix a domicile in a certain quantity of time, would nevertheless have that effect if distributed over a larger space of time. This matter is to be taken in the compound ratio of the time and the occupation, with a great preponderance on the article of time. Be the occupation what it may, it can not happen, with but few exceptions, that mere length of time shall not constitute a domicile." (Sir W. Scott in the case of *The Harmony*, 2 Robinson's Adm. Rep. 324; Lawrence's Wheaton's International Law, ed. of 1863, p. 560.)

Says President Woolsey:

"The nationality of individuals in war depends not on their origin or their naturalization, but upon their domicile. He is a neutral who is domiciled of free choice in a neutral country, and he an enemy who is domiciled in an enemy's country. . . . . A person having a house of commerce in the enemy's country, although actually resident in a neutral country, is treated as an enemy so far forth as that part of his business is concerned, or is domiciled there *quoad hoc*." (Woolsey's International Law, sec. 168.)

In harmony with these principles this court, in *Mrs. Alexander's Cotton* (2 Wall. 419), said:

"It is said that, though remaining in rebel territory, Mrs. Alexander has no personal sympathy with the rebel cause, and that her property therefore can not be regarded as enemy property; but this court can not inquire into the personal character and dispositions of individual inhabitants of enemy territory. We must be governed by the principle of public law, so often announced from this bench as applicable alike to civil and international wars, that all the people of each state or district in insurrection against the United States must be regarded as enemies until, by the action of the legislature and the executive, or otherwise, that relation is thoroughly and permanently changed."

It is clear therefore, upon principle and authority, that when Mitchell purchased this cotton in November and December, 1864, he had by his long residence in the insurrectionary district acquired a domicile there, and became in every legal sense an inhabitant of enemy territory, whatever may have been his individual feelings. Even if he entertained the purpose at that time of resuming his residence in Kentucky at the conclusion of the war, or at some future day not definitely fixed, he was in November and December, 1864, when he purchased this cotton, an "enemy" of the Government of the United States; not perhaps in the strict sense of the

word, but to be deemed such with reference to his property concerned in the trade of the enemy's territory. He was bound by his residence to the society of which he was then a member, obliged to defend that society for the protection it afforded him. He could not maintain his domicile in Georgia, and engage in business there, and still claim the privileges of a citizen and resident of an adhering state.

"The national character of a trader is to be decided, for the purposes of the trade, by the national character of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and his property to another country. If he does not avail himself of the opportunity, he is to be treated for the purposes of the trade as a subject of the power under whose dominion he carries it on, and as an enemy of those with whom that power is at war." (Lawrence's Wheaton's, 574, note 180.)

Had the cotton purchased by Mitchell in November and December, 1864, been shipped for Europe, and while on the seas been captured by Federal cruisers, he would not have been heard to say that he was domiciled elsewhere than in the enemy's territory. The cotton would have been liable to capture by the cruisers of his deserted country; and not only free from capture by the cruisers of the Southern Confederacy, his adopted country, but under their protection. (*The Venus*, 7 Cranch, 277; *The Mary and Susan*, 1 Wheaton, 54.)

Mitchell, therefore, being an "enemy," and having a domicile in the enemy's territory when he purchased the cotton in November and December, 1864, he had the same rights (so far as the courts of the United States are concerned) to buy and sell within the Confed-

erate lines that any other resident of the insurrectionary districts then had. If his locality or domicile subjected him to the disabilities which attached to the position of an enemy and an inhabitant of enemy's territory, he should not be deprived of the privileges and benefits which such an enemy was entitled to enjoy within the limits of his own country.

If this view be correct, then it is clear that Mitchell did acquire a good title to this cotton by his purchases in November and December, 1864, even had he then been in rebellion against the nation. The amnesty proclamation of December 25, 1868, is without exception as to the persons to whom it applies, and without limitation as to the rights, privileges, and immunities thereby restored. It applies alike to all, whether citizens of South Carolina or Kentucky, who "directly or indirectly participated in the late insurrection or rebellion," and its resulting benefits must accrue to all alike and equally.

It was urged in the court below, and will doubtless be claimed here, that the purchase of this cotton by Mitchell in 1864 was in violation of the non-intercourse act of July 13, 1861, and was such commercial intercourse as that act was intended to prohibit.

In support of this view numerous authorities were cited in the Court of Claims by the Assistant Attorney-General. We will have occasion to comment upon these authorities in the course of this brief.

We submit that trading by and between persons wholly within the Confederate lines, which did not in its prosecution require or involve intercourse across the

lines, or communication with or assent by persons then in loyal territory, was not only not prohibited by statute or public law, but the right to do so has been too often upheld by the courts to admit of question.

Had Mitchell gone to the South not for the purpose of remaining there for an indefinite time or during the war, but for the purpose of purchasing cotton and immediately bringing it back across the lines into loyal territory, in violation of the non-intercourse act, in such a case, although the transaction was wholly within enemy's territory, we might admit, without impairing our argument, that he would not have acquired any title to such cotton as against the United States. In the case supposed the acquisition of the cotton would have been directly connected with or resulted directly and immediately from the illegal entrance into the enemy's territory for a purpose expressly inhibited by the statute, if not by the general laws of war.

But the case here presented to the court is wholly different from the one supposed. Having been domiciled in the enemy's territory for more than three years prior to his purchase of the cotton, he had the right to trade within the Confederate lines with persons on that side, and the property thus acquired became absolutely his, subject of course to the right and power of the United States to confiscate it as enemy's property. But the Government has not seen proper to exercise such power with reference to cotton owned by individuals, whether loyal or disloyal. On the contrary, the Supreme Court has expressly held that there is no confiscation of such cotton when seized by the Government; that pos-

session is in the Government, but that the right of property remains in the original owner; and that restoration is pledged upon actual proof of loyalty or executive pardon; thus making the Government trustee for all the owners. (*United States* v. *Klein*, 13 Wal. 128.)

We propose now to examine the principal cases relied upon by the Government in the court below in connection with the non-intercourse act of July 13, 1861.

That act, after authorizing the President to declare by proclamation the boundary of the insurrection, and that "*thereupon*" commercial intercourse shall cease and be unlawful so long as such condition of hostility shall continue, provides that "the President may, in his discretion, license and permit commercial intercourse with any *such part of said state or section*, the inhabitants of which are so declared in a state of insurrection."

This language indicates that the commercial intercourse which was intended to be prohibited was that between the *territory embraced by the insurrection* and the *territory beyond the line of insurrection*, and not to commercial intercourse between individuals wholly within the respective boundaries of the belligerents, touching property also wholly within the boundaries where the intercourse or transaction occurred, and which was not to be carried across the lines of military occupation. And when the non-intercourse act describes what goods, chattels, wares, and merchandise shall be forfeited to the United States for violations of its provisions, it does not refer to goods, chattels, wares, or merchandise which may have been purchased

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within the enemy's lines, and not to be removed therefrom, but forfeits only "all goods and chattels, wares and merchandise *coming from said state or section into the United States, and all proceeding to such state or section.*"

These views are sustained by the case of *United States* v. *Anderson* (9 Wallace), and are not in conflict with any decision of this court of which we are aware. Anderson, a resident of South Carolina during the war, purchased cotton from two persons who resided at the time in the insurrectionary district. The transaction was wholly within the Confederate lines. It was proven that Anderson was loyal to the Government, had never given any aid or comfort to the rebellion, or to the persons who were engaged in it. The fact that he was loyal to the United States, although residing within the lines of the Confederate army, was not supposed to prevent him from purchasing cotton from Confederates. His title was maintained in this court, since the transaction involved no commercial intercourse between the warring sections.

At the same term of this court was decided the case of *United States* v. *Grossmayer* (9 Wallace, 72), which was relied upon by the Government in the court below. But that case is not in conflict with the principle upon which we rest Mitchell's right to recover. The facts in that case were these: When the war broke out, Einstein, whose domicile was in Georgia, was largely indebted to Grossmayer, whose domicile was in New York. While the war was in progress Einstein and Grossmayer, without the license of the President, kept up a correspond-

ence with each other across the lines on the subject of that indebtedness through a third person, who passed *back and forth* between Georgia and New York. The result of this unauthorized correspondence and communication was that Einstein, *by request or direction of Grossmayer* (communicated *from* loyal territory *to* enemy's territory through an agent), invested the money he owed Grossmayer in cotton for Grossmayer's benefit, and the latter ratified the arrangement. The cotton having been seized by the United States upon the capture of Savannah, Grossmayer claimed it as his property, and sued for the proceeds under the captured-and-abandoned-property act. This court held that the title acquired by Grossmayer was by means of commercial intercourse forbidden by the statute, and his claim was denied.

It is not perceived that there is any thing in the Grossmayer case which militates against the principle upon which we rest the claim of Mitchell. In that case direct communication was established during the war between Grossmayer in New York and Einstein in Georgia, for the purpose of having the latter remit to Grossmayer, *across the lines*, the money due him from Einstein, or invest it in cotton to be held for Grossmayer, domiciled in New York. A remission of the money to New York would have been commercial intercourse in the strictest sense, and as such was prohibited. Equally so was the purchase of cotton by Einstein in Georgia for Grossmayer in New York, in pursuance of intercourse had between them across the lines. One of the parties to the transaction resulting in the purchase of the cotton was a citizen of New York, acting through

a citizen of Georgia as his agent. Said this court in that case, "While the war lasts nothing which *depends on* commercial intercourse is permitted." Grossmayer's title to the cotton did depend upon intercourse across the lines between himself and Einstein. An arrangement made during the war, across the lines, for the purchase of cotton for Grossmayer in the insurrectionary district was commercial intercourse; and as Grossmayer could not make title except through such prohibited commercial intercourse, his claim was denied. The acquisition of title by Grossmayer was directly connected with, and in pursuance of, prohibited intercourse.

But the case upon which the Government chiefly relied in the Court of Claims was that of the *United States* v. *Lapene* (17 Wall. 602). But when this case is carefully examined it will not be found against us. While all Louisiana, *including New Orleans*, was under Confederate control, a New Orleans firm sent their clerk into the interior of that state to make collections, and gave him authority to purchase sugar and cotton *for the firm.* In 1862, and before New Orleans came under Federal control, that firm requested one Avegno, who was then about to go from New Orleans to the interior of the state, to remit to their clerk $5,000 and assist him in making purchases. This Avegno did before the capture of New Orleans by the Federal forces. While the clerk and Avegno were in the interior *New Orleans was captured by the Federal forces*, and thenceforward remained under their control. *After* the capture of New Orleans the clerk of the New Orleans firm, with the money delivered by Avegno, and with

other moneys collected by him—his *principal being then in New Orleans, within the Federal lines*—made purchases of cotton *for his principal* in those portions of Louisiana which were then under Confederate control, and left the cotton at the places where purchased. Subsequently the cotton was captured by the Federal forces, and the proceeds were claimed by Lapene & Fene.

It will be observed from the foregoing statement of facts that *at the time* Lapene & Fene claimed to have become owners of the cotton through the purchases made by their clerk in the interior, they (L. & F.) were domiciled in New Orleans, and within the Federal lines, while their clerk who made the purchases, as well as the owners of the cotton and the cotton itself, were all *within the Confederate lines.* At the time of the purchase of the cotton the vendor was domiciled within the Confederate lines, while the vendees were domiciled within the Federal lines.

As the agency to purchase the cotton was created when it was legal to do so, and as there was no communication between Lapene & Fene and their clerk after the occupation of New Orleans by the Union forces, it was a very hard case that Lapene & Fene should be denied the right to recover. But the court placed its decision upon grounds which do not conflict with the views which we are endeavoring to maintain in this case. When the Federal forces captured New Orleans and reinstated the national authority there the attitude of Lapene & Fene and their clerk toward each other changed. Their respective domiciles or residences made them thereafter enemies. Say the court, "The agency

to purchase cotton was terminated by the hostile *position* of the parties." Again, "The transaction took place after the parties became *residents of hostile portions of the state.*" To say that a resident of loyal territory could acquire title through a purchase made during war, in the enemy's territory, by one who had by operation of the war ceased to be an agent, and had become by his locality an alien enemy, was forbidden, said this court, by the soundest principles of public law. The agency of the clerk after the occupation of New Orleans by the Federal forces could have continued only for the purpose of receiving any debts due Lapene & Fene. A continuance of such agency after such occupation for the purpose of making new contracts, such as purchasing cotton, would have involved, in a legal sense, commercial intercourse between the owners of the cotton, residing *at the time* within the Confederate lines, and Lapene & Fene, residing *at the time* within the Federal lines. Lapene & Fene were parties to the contract, although their agent was within the Confederate lines when he made purchases for his principals. It was a transaction, so far as the real parties in interest were concerned, between those who were at the time residents of hostile portions of the same state.

For these reasons this court denied the claim of Lapene & Fene.

In the opinion in that case will be found the following language:

"All commercial contracts with the subjects *or in the territory of the enemy*, whether made directly by one in person or indirectly through an agent, who is neutral, are illegal and void. This principle

is now too well settled to justify discussion. No property passes and no rights are acquired under such contracts." (*Montgomery* v. *United States*, 15 Wall. 395.)

We submit, with great respect, that this broad language should be qualified by the remaining portion of the opinion in the Lapene case, and should be construed in the light of the facts stated in the opinion. Is it correct to say that "*all* commercial contracts . . . *in the territory of the enemy* . . . are illegal and void"? This court has often upheld commercial contracts made "in the territory of the enemy" by residents thereof, where the transaction was wholly within the enemy's territory, and did not involve commercial intercourse across "the line of non-intercourse," which this court, in another portion of the opinion in the Lapene case, say was "the boundary-line between *the territories* of contending nations."

The language above quoted from President Woolsey was evidently intended to refer to commercial transactions which, although in enemy's territory, were had between parties, one of whom was at the date of the transaction, and when the title passed, domiciled in loyal territory, while the other had his domicile in enemy territory.

We submit, with great confidence, that the contract under which Lapene & Fene claimed the cotton was declared by this court insufficient to pass the title, not simply because it was a contract "*in the territory of the enemy*," but because the title under which the cotton was claimed was the direct result of commercial intercourse between residents of "the territory of the enemy" and

residents beyond that territory and within the Federal lines. Had Lapene & Fene left New Orleans upon the approach of the Federal troops, or had they, after the occupation of that city by the Federal troops, been permitted by General Butler to remove within the Confederate lines, and had they when the cotton was purchased become *domiciled* in the insurrectionary districts, their right to the proceeds of the cotton could not have been questioned.

The broad language used in the Lapene case seems to have been based upon a paragraph in Woolsey's International Law, section 117. That paragraph was referred to in *Montgomery* v. *United States* (15 Wall. 400), where the court virtually concede that the rule is stated too broadly by President Woolsey. That case is worthy of special examination. A British subject domiciled in New Orleans made a written agreement in 1862, *after* the capture of that city by the Federal forces, with Burridge—a loyal person residing in the same city, and who was and had been for two years the factor and agent of Johnson, a planter, *then residing within the Confederate lines*—by which Burridge, as the agent of Johnson, sold to Montgomery a crop of sugar, molasses, and rum *then on Johnson's plantation within the Confederate lines.* At the time of this contract Burridge gave an order upon the overseer of Johnson directing him to deliver the entire crop then on the plantation to Montgomery.

The contract contemplated the delivery of the sugar, molasses, and rum at New Orleans. Subsequently the crop thus attempted to be sold to Montgomery came

into the possession of the Federal forces and was sold, and the proceeds paid into the treasury.

Montgomery brought his suit in the Court of Claims under the captured-and-abandoned-property act.

The contract was held to be illegal and void upon the ground that it was "a case of trading with a public enemy." This court say:

"The subject of the contract was personal property within the Confederate lines. It was a crop at the time on the plantation of Leo Johnson, in the parish of La Fourche Crossings. It belonged also to Johnson, who was then domiciled in the enemy's territory, and who was himself an enemy. This is expressly stated in the contract itself. The appellant's right therefore is founded upon an attempted purchase, during the war, from an enemy of enemy's property, in direct violation not only of the laws which always prevail in a state of war, but also in violation of the acts of Congress. It is vain to contend that any right can be acquired under such a contract.

"It is true the sale was negotiated by agents of Johnson, living outside of the enemy's territory, but it was not the less his act *because it was done by those acting under his authority.* Nothing is clearer, says President Woolsey, than that all commercial transactions, of whatever kind (except ransom contracts), with the subjects, or in the territory of the enemy, whether direct or indirect, as through an agent or partner who is neutral, or illegal and void. This is not inconsistent with the doctrine that a resident in the territory of one belligerent may have in times of war an agent residing in the territory of the other belligerent, to whom his debtor may pay the debt or deliver property in discharge of it. Such payments or deliveries involve no intercourse between enemies. The present case exhibits a transaction *not wholly within enemy's territory*, but a sale *from* an enemy *to* a friend. If that can be made through an agent, then the rule which prohibits commercial intercourse is a mere regulation of the mode of trade. It may be evaded by simply maintaining an agency in the enemy's territory. In this way every pound of cotton or of sugar might have been purchased by northern traders from those engaged in the rebellion. Perhaps the rule is stated too broadly in Woolsey's Commentaries and in many elementary books, but it is certain that 'every kind of

trading or commercial intercourse, whether by transmission of money or of goods, or orders for the delivery of either, between *two countries* (at war), directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form *looking to* or *involving such transmission*,' are prohibited. (*Kelsey* v. *Kershaw*, 100 Mass. 576.) The contract in this case contemplated the delivery of the sugar, molasses, and rum at New Orleans, then within the Federal lines. There, on its being weighed and measured, payment was to be made to Johnson's agents. If this be allowed, the enemy is benefited and his property is protected from seizure or confiscation."

This case, although it has been relied upon to defeat Mitchell's claim, settles no principle adverse to it, but is in perfect harmony with the principles for which we are contending. It was a case of contract between a resident of loyal territory and a resident of enemy's territory, the latter acting by an agent within the Federal lines; but the act of this agent was nevertheless in every essential sense the act of the party who was when the contract was made within the Confederate lines. As in the case of *United States* v. *Lapene & Fene*, the real vendor at the time of the contract was domiciled in enemy territory, while the vendee was at the same moment of time domiciled in loyal territory. It was a contract necessarily involving commercial intercourse at the time of its execution across the line of military occupation, and therefore no right attempted to be conferred by it could be recognized in a court of the United States. Indeed this court, in the Montgomery case, in effect concede that a recovery would have been allowed if the title to the cotton had been acquired under a contract made "wholly within the enemy's territory," not involving transmission "between two countries," and to the making of which it was not essential to have the

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assent or concurrence of any one domiciled within the Confederate lines.

We next invite attention to the case of *Cutner* v. *United States* (17 Wall. 516), decided at the same term that *United States* v. *Lapene* was.

Cutner, a loyal citizen of the United States, resident in Georgia, was the owner of thirty bales of cotton stored in Savannah at the time of its capture by the Union army. In February, 1865, his cotton was reported to the military authorities, was sold, and the proceeds paid into the treasury. On the 6th of March, 1865, Cutner made in Savannah a sale of the cotton to Schiffer & Co., then domiciled in New York, and subsequently, for the use of Schiffer & Co., sued to recover the proceeds under the captured-and-abandoned-property act. It was decided by this court that the contract passed no title to Schiffer & Co., because, although Savannah was occupied by the Federal troops, it was still within the insurrectionary district as defined by the President's proclamations, and the contract necessarily involved intercourse or communication between parties domiciled at the time in the respective belligerent sections.

This case is referred to for the purpose of showing that the contract was not held invalid because made "in the territory of the enemy," but because when made one of the parties was an inhabitant of the insurrectionary district, while the other was domiciled in loyal territory, although acting by an agent domiciled in the enemy's territory. It involved "intercourse between the inhabitants of the two belligerent sections," and *therefore* it was embraced by the non-intercourse act.

In view of the authorities to which we have referred, we think we may safely say that neither the statute of July 13, 1861, nor any rule of public law forbade Mitchell, being domiciled in Georgia, from trading with persons also residing within the Confederate lines; such trading not contemplating or involving commercial intercourse in any way, nor any transmission of money or goods or correspondence *across the line* dividing the belligerent sections. The non-intercourse act of 1861 was never intended to invalidate such individual transactions as that which Mitchell had when, being domiciled in the enemy's territory, he purchased this cotton in November and December, 1864, from persons also domiciled in that territory. There are several decisions in which the general statement is made, as in *McKee* v. *United States* (8 Wall. 166), that "unlicensed business intercourse with an enemy during a time of war is not permitted." By "enemy" is here meant one who is domiciled in the insurrectionary district, not one who has gone within that district for a short period with no intention to become connected with the trade of that country, but with the intention to return therefrom in some short time. To have business intercourse with such an enemy *across the lines* was the intercourse which was intended to be forbidden by the act of Congress. This is clear from the case of *McKee* v. *United States*, in which this court, after declaring "that unlicensed business intercourse with an enemy during a time of war is not permitted," says:

"Congress therefore, in recognition of *this principle*, when it declared on the 13th of July, 1861, that commercial intercourse between

the *seceding states* and the *rest of the United States* should cease and be unlawful after the proclamation of the President that a state of insurrection existed, authorized the President in his discretion to license trade."

This language clearly indicates that the purpose of the act of Congress was not to prohibit business intercourse wholly within the enemy's territory between persons there domiciled, but between the seceding states on one side and the rest of the United States on the other side — between the *territories* of the two belligerents.

This view is in harmony with the case of *Kelsey* v. *Kershaw* (100 Mass.), referred to with approval in *Montgomery* v. *United States.*

The facts in that case were these: Kelsey, a citizen of Massachusetts, in February, 1864, in Mississippi, took from Kershaw, then and ever since a citizen and resident of Mississippi, a lease for one year of a cotton-plantation in that state, agreeing to pay a certain rent therefor, part in cash and part out of the crop made. Kelsey paid the first installment of rent, took possession of the plantation, cultivated it, and used some of the corn on the plantation; but shortly after taking possession he was driven away by Confederate soldiers, and he came back to Massachusetts. Kershaw continued to reside on the plantation, made a crop of cotton, and delivered it to Kelsey's son, who shipped it to his father, who sold it and retained the profits. Kelsey having been sued by Kershaw for the unpaid installment of rent and the value of the corn used by him, he contended that the lease, having been made during the war, was illegal and void, as well by principles of international law as by the

act of Congress and the proclamations of the President under that act.

After an exhaustive review of all the authorities, the Supreme Judicial Court of Massachusetts unanimously held that the agreements contained in the lease were valid. The court held:

"1. That the trading or transmission of property or money which is prohibited by international law is *from* or *to* one of the countries at war. An alien enemy residing in this country may contract and sue like a citizen." (2 Kent's Com. 63.)

"2. That the acts of Congress and the proclamations of the President, upon which the defendant relies in this case, are in terms limited to the prohibition of commercial intercourse and the conveyance or transmission of goods and merchandise between the territories occupied by the two belligerents; and thus clearly manifest the intention of the Government, in accordance with what we have seen to be the general law of nations, that commercial intercourse, and commercial intercourse only, should be prohibited. They clearly do not extend to agreements made *in the enemy's territory between two persons living there*, for the leasing of real estate therein, the payment of rent there out of the products of the land, or the delivery of and payment for personal property already upon the devised premises, and to be used therein."

The Massachusetts court further say:

"The lease now in question was made within the rebel territory, where *both parties were at the time*, and would seem to have contemplated the continued residence of the lessee upon the demised premises throughout the term; the rent was in part paid on the spot, and the residue, now sued for, was to be paid out of the produce of the land; and the corn, the value of which is sought to be recovered in this action, was delivered and used thereon. *No agreement appears to have been made, as part of or contemporaneously with the lease, that the cotton crop should be transported or the rent sent back across the lines between the belligerents; and no contract or communication appears to have been made across that line*, relating to the lease, the delivery of possession of the premises or of the corn, or the payment of the rent of the one or the value of the other. The subsequent forwarding of the cotton

by the defendant's son from Mississippi to Massachusetts may have been unlawful; but that can not affect the validity of the agreements contained in the lease. Neither of these agreements involved or contemplated the transmission of money or property, or other communication, between the enemy's territory and our own. We are therefore unanimously of opinion that they did not contravene the law of nations, or the public acts of the Government, even if the plantation was within the enemy's lines; and that the plaintiff upon the case reported is entitled to recover the unpaid rent and the value of the corn."

We submit that the Massachusetts case announces the true doctrine. It is not in conflict with any decision of this honorable court of which we are aware. If approved in its more important features, Mitchell's right to a judgment can not be doubted.

The propositions then upon which we rely are:

1. That the general commanding the department of Kentucky had the right in July, 1861, prior to the President's proclamation in pursuance of the non-intercourse statute, to give Mitchell a military pass to enter the Confederate lines.

2. If the department commander had no such authority, and if Mitchell's going into the Confederate lines in July, 1861, was illegal, there is no direct or necessary connection between that illegal act and his purchase of the cotton in question in November and December, 1864, especially as it is not found either that he purchased that cotton with any money taken by him across the lines, or that he had any purpose to transport it across the lines or out of the country in violation of the non-intercourse act or the laws of war. The illegality of Mitchell's entrance into the Confederate lines in 1861 can not vitiate his purchase of cotton in 1864.

3. By his voluntary residence within the insurrection-

ary district for more than three years prior to his purchase of the cotton, engaging in business there during that period, he had, at the time of his purchase, acquired such a domicile in the insurrectionary district as made him an "enemy" and an "inhabitant of enemy territory," with all the disabilities attaching to such persons, and with the same privileges that any other enemy had to trade *within the lines* of the insurrectionary district with the inhabitants thereof.

4. As the transaction by which Mitchell became the owner of the cotton took place after he had been domiciled in and been engaged in the business of the enemy's territory for more than three years, and when he was himself an "enemy"—and as that transaction was wholly within enemy's territory and with enemies, involving neither communication or transportation across the lines, nor requiring the assent or approval of any person domiciled at the time within the Federal lines, as a condition precedent to his ownership of the cotton—a complete title was vested in him by the purchase made in November and December, 1864. He made no agreement, as part of or contemporaneously with his purchase of the cotton, that it or its proceeds should be sent or taken across the lines into loyal territory, and consequently his title was acquired without any violation of the laws of war or the provisions of the non-intercourse act of July, 1861.

A reversal is respectfully asked.

JOHN M. HARLAN,
Attorney for Appellant.

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In the Supreme Court of the United States.

OCTOBER TERM, 1874.

WARREN MITCHELL, *Appellant*,
vs.
THE UNITED STATES. } No. 404.

BRIEF FOR APPELLEES.

Warren Mitchell, the appellant, being a citizen of the United States, and a resident of Louisville, in the State of Kentucky, voluntarily left his home pending the war of the rebellion, and went within the insurgent lines. He returned to his home in Louisville during the war. The question in the case is whether Mitchell acquired a domicil within the insurgent lines. His object in going from home, or in going within the insurgent lines, does not appear, further than that the court below finds that "while within the insurrectionary district he transacted business, collected debts, and purchased from various parties seven hundred and thirty-four bales of cotton." It is for the proceeds of this cotton that the suit is brought.

If Mitchell acquired a domicil within the insurgent lines, his business there was legitimate, and he is entitled to recover; if not, his business there was illegitimate, and he is not entitled to recover.

1.

The appellant was not domiciled in Georgia when he purchased the cotton.

1. There is nothing in the case to show or indicate that Mitchell intended a change of domicil. The reverse appears. If he had intended to expatriate himself, and cast his lot with the insurgents, he would not have left them and returned to Louisville before the fate of the new government was decided. His acts in the premises were so inconsistent with such an intention that to argue the intention from the acts cannot be expected from the eminent and learned counsel who represents him here. Besides, he avers in his petition in the case (to which he makes oath) that he has "*at all times* borne true allegiance to the Government of the United States." Certainly such an averment is inconsistent with either the fact or the intention of expatriation.

2. At the time Mitchell left his home in Louisville, which was "during the month of July, 1861, and subsequent to the 17th of the month," flagrant war existed between that part of the United States where he lived and the part to which he went, viz., the State of Georgia. (*Prize Cases*, 2 *Black*, 635.) Hence, he had no right to change his residence. He had no right to leave his country, much less to go into the enemy's country. (*Vattel*, § 220.) "As to those who have the cowardice to abandon their country in a time of danger, and seek to secure themselves, instead of defending it, they manifestly violate the social compact, by which all the contracting parties engaged to defend

themselves in a united body and in concert; they are infamous deserters, whom the State has a right to punish severely." This strong language of Vattel refers to citizens who, when their country is engaged in war, emigrate to a neutral country. It does not seem to have been in the contemplation of law writers that a citizen would in time of war go over to the enemy. It is not necessary in this case to discuss the general question of the right of a citizen to quit his country, or the society of which he is a member. The maxim of the common law was "*nemo potest exuere patriam;*" and although this doctrine has been much relaxed, it has always been and still is held, that no citizen has a right to quit his country in the time of danger or distress, and when he could be of service to his sovereign.

If Mitchell, being a citizen of the United States and a resident of Louisville, had been in the State of Georgia when the war broke out it would have been his duty to return home "*without delay.*" *The William Bagaley*, (5 Wall., 377.)

II.

Being a citizen of the United States, resident in Louisville, Mitchell could not deal with residents of Georgia.

From the finding of facts by the court below, it is fair to presume that the appellant not only continued to be a resident of Louisville, but continued in business there; and that he carried with him into the insurgent lines the means with which to purchase the cotton for which he makes claim. We cannot presume that he was ever before in the State of Georgia; much less that, during the time he was there, he acquired, from nothing, means sufficient to purchase *seven hundred and*

thirty-four bales of cotton. That he "collected debts" within the insurrectionary districts, as the Court of Claims finds, does not imply that the debts were due him before he went there; for, preliminary to this finding, the court finds that he "transacted business" there. The hypotheses of the learned counsel for the appellant—that he went South for the purpose of "saving his property," or to "save his estate," are outside the record.

But whether Mitchell did or did not take anything with him is not material. His residence, his home, his domicil, was Louisville, in the State of Kentucky. The purchase of cotton was in the State of Georgia, from persons resident there. This brings the case within the rulings of this court in the cases of *Grossmeyer*, (9 Wall., 72,) of *Montgomery*, (15 Wall., 400,) of *Lapene & Ferre*, (17 Wall., 602,) and of *Cutner*, (17 Wall., 516.) In the case of *Lapene & Ferre*, this court briefly and clearly states the law as follows:

"All commercial contracts with the subjects, or *in the territory* of the enemy, whether made directly *by one in person*, or indirectly through an agent, who is neutral, are illegal and void. This principle is now too well settled to justify discussion."

The case of *Kershaw* vs. *Kelsey* (100 Mass. R., 561) is cited and relied upon by the counsel for the appellant. There is nothing contended for herein that is not sustained by the opinion of the court in that case. The judgment rendered in the case may be at variance with the adjudications of this court, but the case itself is not similar to the case at bar. In that case it did not appear whether Kelsey went to Mississippi before or after the beginning of the war; and the subject of the

contract, so far as it was considered, in the opinion of the court, was real property. And the learned judge who deliverd the opinion of the court draws the distinction between contracts in respect to real property and personal property, and holds (as all courts have held) that "every kind of trading or commercial intercourse, whether by transmission of money or of goods, or orders for the delivery of either, between two countries, (at war,) directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission," are prohibited.

Some stress is laid upon the fact found by the court below, that Mitchell "procured from the commanding general in Kentucky a military pass permitting him to go through the military lines into the insurrectionary district." The pass itself is not produced, and we do not know its purport; but whatever it was, it was merely a "military pass." The effect of such a paper could only be to exempt the bearer of it from military arrest by soldiers under the command and subject to the order of the "commanding general" who gave the pass. It derived all its force from the hand that wrote it. It would give Mitchell safe conduct through the "military lines" of the Government, but would not help him in getting within the insurgent lines. The power of General Anderson extended to his pickets, but no further.

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